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In the
Supreme Court of the United States
OCTOBER TERM, 1952

THE CHRYSLER CORPORATION,
Petitioner,

VERSUS

RUTH KANATSER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, The Chrysler Corporation, prays a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the decision of that Court in the cause entitled, "Ruth Kanatser, petitioner, v. The Chrysler Corporation and Stephen S. Chandler, Jr., Judge, respondents", No. 4434 therein, wherein, on certiorari to the United States District Court for the Western District of Oklahoma, the Court of Appeals vacated an order of the District Court granting petitioner a new trial, and ordered reinstated a purported judgment against petitioner for $33,283.00, on the grounds that the new trial was ordered by the District Court upon its own initiative more than ten days after entry of judgment, in violation of Civil Pro-

cedure Rule 59(d), and that the trial had been fair and without prejudicial error.

OPINIONS BELOW

The opinions of the Court of Appeals have not been reported, but the original and that denying a rehearing are set forth on pages 51 and 68 of the record of the proceedings in the Court of Appeals.

JURISDICTION

The decision to be reviewed was entered on August 28, 1952, and rehearing was denied on October 22, 1952. The jurisdiction of this Court is invoked under Section 1254(1), Title 28, USCA.

QUESTIONS PRESENTED

1. Whether, under Section 1291, Title 28, USCA, providing that "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States", and Section 1651, Title 28, USCA, providing that "All courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions", the Court of Appeals had jurisdiction by certiorari to review the cause as on appeal and vacate the order granting a new trial.

2. If the Court of Appeals had such jurisdiction, then whether, under Civil Procedure Rule 58, providing that the clerk's "notation of a judgment in the civil docket, as provided by Rule 79(a), constitutes the entry of the judgment", and under Rule 79(a), providing that "the notation shall be brief but shall show * * * the substance of each

order or judgment of the court," two entries in the civil docket reciting the trial and verdict, and one stating, "Judgment entered on verdict per J. E. (journal entry) to follow", and the other, "Judgment entered on verdict, and counsel for pltff. directed to prepare J. E. accordingly," without stating for whom, against whom or for what amount judgment was rendered, constituted the entry of a judgment within the meaning of the law and the Rules, so as to bar the court from granting a new trial on its own initiative after the expiration of ten days from the date of said entries.

3. Whether, petitioner having filed a timely motion for a new trial containing assignments which, if correct, entitled it to a new trial, and the District Court, without ruling upon those assignments, having ordered a new trial upon an unassigned ground, the Court of Appeals had jurisdiction by certiorari to review and overrule the grounds for a new trial assigned in the motion, and order the District Court to enter final judgment against petitioner, or whether in any event its jurisdiction was limited to vacating the order granting a new trial and remanding the cause to the District Court with directions to consider and act upon the assignments contained in the motion.

4. If the Court of Appeals had jurisdiction to review the cause by certiorari, then whether the trial court's refusal to hear competent evidence offered by petitioner upon the crucial issue in the case; his several statements in the jury's presence that petitioner's two witnesses who had qualified as experts were not competent to testify to relevant facts which they had personally seen and observed but could only answer hypothetical questions, and that

anything else from them was "improper and immaterial"; his commendation of respondent's witnesses and disparagement of petitioner's witnesses in the jury's presence; and his statements in his instructions that he believed respondent's witnesses, and that in his opinion she was entitled to recover, were prejudicial and rendered the trial unfair.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The action is for damages for injuries suffered in an automobile collision in August, 1948. Respondent purchased a new Dodge automobile manufactured by petitioner, and had it delivered to her at the home of her sister, Mrs. Wartosky, in Detroit. A few days later the two started to drive to Oklahoma City, and, when near Pontiac, Illinois, they collided with a car traveling north, resulting in the injuries sued for.

Respondent alleged that the left tie rod was fractured when it was placed on the car, that it broke in operation, that the car went out of control and struck an oncoming car, and that petitioner was negligent in failing to inspect the rod and in placing it on the car (R. 2-3).

Petitioner denied negligence and that the rod was fractured, and alleged that Mrs. Wartosky negligently drove the car into the oncoming car and that the rod was broken in the collision (R. 6).

The highway was paved and dry. The accident occurred about 11:00 o'clock a.m., and on a slight curve to the west. Mrs. Wartosky was driving; and she and re-

spondent testified that they were "talking", and were driving only 36 or 37 miles an hour, that the car went out of control some distance from the point of collision, that the wheels wobbled as though running over ruts, and that she applied the brakes and turned the steering wheel to the right but the car kept going to the left.

Three men in the other car testified that they observed the Kanatser car when it was 400 or 500 feet away, that it was coming fast and did not reduce its speed, and that they saw no wobbling or shaking of the wheels and no indication that it was out of control, but that, instead of taking the curve to the west, it was gradually crossing the center line and coming straight toward them; notwithstanding which the court instructed the jury as though it were an admitted fact that "her car went out of control."

There was no contention that the brakes were defective. Both Mrs. Wartosky and respondent testified that the oncoming car was distant "quite a way" a half or quarter of a mile, when their car went out of control. Nevertheless the Kanatser car had such momentum that the impact folded back its left front fender, thrust its left front wheel between the left rear wheel and frame of the oncoming car, tore the rim and tire off the wheel of the Kanatser car, and, after doing so, it went across a ditch three feet deep, struck a culvert, then climbed up on an unpaved parallel highway and traveled on it between 200 and 300 feet south.

It was the rod that controlled the left front wheel that was broken. It was tubular and had a seam in it from one end to the other. At the end of each piece of it was

a leather grease container, and the one on the longer piece was mashed and ruptured, and the rod itself contained oil put into it to prevent rust. The rod did not merely come apart as from vibration; but both pieces were bent and there was a dent in the longer piece which petitioner contended was made by the rod being forced back against the frame and there bent and broken, and the seam in both pieces was opened and spread where the bend and break occurred which petitioner contended was caused by a blow.

Aside from the testimony of Mrs. Wartosky and respondent, the only evidence that the rod was broken before the collision was the following:

HUGH FEENEY, a mechanic in Pontiac, testified that in repairing the car he found that the longer piece of the rod was still attached and hanging down; that he took it off and found that a portion of the edge of the break was discolored; that he preserved it and showed it to Zell Jones and Edward Bellmore; and that in his opinion the rod was fractured before the collision, but that the discoloration of a portion of the edge of the break was the sole reason for that opinion. ZELL JONES, EDWARD BELLMORE and JAMES BRUNTON testified that they examined the piece and that a portion of the edge of the break was not bright but was dark grey in color. Brunton testified that the discoloration was not rust.

Petitioner's witnesses MARCUS, production engineer of Thompson Products Company that made the rod, and HANSON, metallurgist of The Chrysler Corporation, undertook to testify how the rod was made and the inspections

and tests it underwent during and after its manufacture and before and while it was being placed on the car; and also that grease or oil was put in the rod to prevent rust, and that, in their opinion, after the collision it seeped upon the broken edge of the piece that hung down and discolored it; but the court in the jury's presence, characterizing them as experts, stated that they could only answer hypothetical questions, that all it was competent for them to state was "how much it would take to break the rod", and that anything else from them was "improper and immaterial." And notwithstanding the basis of the action was negligence, the court stated in the jury's presence that evidence as to the inspections and tests the rod underwent "wouldn't enlighten the jury the least bit."

Marcus testified that he and Hanson took a 1948 Dodge of the type involved, and against its frame broke with levers tie rods thereon at the same place on each at which the rod in question was broken, and that the oil in the rods seeped upon the broken edges of each piece that hung down and discolored it exactly as the broken edge of the piece in question was discolored. Petitioner then placed Hanson on the stand and sought to have him give his testimony as to those experiments and their results, whereupon respondent's attorney stated that he would agree that Hanson's testimony would be the same as that of Marcus and therefore objected to his giving it, and the court sustained the objection and refused to permit Hanson to testify regarding the experiments and their results.

After Feeney had testified, and before Marcus and Hanson had been called to the stand, respondent's attorney requested that Feeney be excused, to which the court in

the jury's presence replied: "I would like to have him here *after these other experts take the stand*, if it is possible. * * * It just occurs to me I might want to examine him afterwards. This is a little technical and I would like to find out about it from a practical man." And the court had him remain. Further, in his instructions to the jury the court said:

> "It seems to me that Mr. Feeney, a practical mechanic of many years' experience, would know whether or not there was a preexisting crack in that piece of metal, in that tube. I think he did know. I think he could determine that with reasonable certanty. I believe his testimony that there was a preexisting crack in the piece of metal. From that, I think, under the other facts in this case, the only reasonable conclusion to draw is that it must have been broken."

On November 3, 1950, the jury returned a verdict for respondent in the sum of $33,283.00; and on that date the clerk made two entries in the civil docket, each reciting the return of the verdict, and one stating that, "The verdict is ordered filed and jury discharged; judgment entered on verdict per J. E. to follow"; and the other that, "Judgment entered on verdict and counsel for pltff. directed to prepare J. E. accordingly." No other entry was made either in the journal or on the civil docket until July 16, 1951, the day the court granted a new trial.

Petitioner filed a timely motion for judgment *non obstante* and in the alternative for a new trial, in which latter it assigned the commission of numerous errors prejudicial to it but inadvertently omitted to assign that the verdict was excessive. It filed a brief in support of the motion.

That motion for a new trial has never been overruled. On June 27, 1951, the court declared the verdict excessive, and ordered respondent to make a remittitur, which she refused to do. Thereupon, on July 16, 1951, the court signed and there was entered a journal entry which recited the trial, the verdict and the foregoing proceedings, and concluded as follows:

> "It is therefore ordered, adjudged and decreed that the verdict and judgment spread of record herein on the 3rd day of November, 1950, be set aside; and defendant's motion for new trial is granted on the ground that the verdict is excessive and because of the failure of plaintiff to file a remittitur as required by the court."

On July 18, 1951, there was entered on the journal an order signed by the judge overruling petitioners motion for judgment *non obstante*, and stating that its "alternative motion for new trial has been disposed of as shown by the journal entry of judgment filed herein on the 16th day of July, 1951."

Those two journal entries and the clerk's notations on the civil docket hereinbefore set out were the only entries made in the case.

From the order granting a new trial respondent took an appeal, which the Court of Appeals dismissed on the ground that the order was not a final judgment and therefore not appealable (*Kanaster* v. *The Chrysler Corp.*, 195 F.2d 104). Thereupon respondent filed a petition for certiorari, which the Court of Appeals granted over petitioner's objection that it was without jurisdiction to review the cause by certiorari; and on certiorari it held, contrary to

petitioner's contention, that the entries of November 3, 1950, in the civil docket, set out above, constituted the entry of a judgment under the law and Rules of Civil Procedure, and that the new trial was granted more than ten days thereafter and upon the court's own initiative; and it reviewed the assignments in petitioner's motion for a new trial, held that they were not well taken, in effect itself overruled the motion, and it ordered the purported judgment reinstated.

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that it had jurisdiction to review the cause upon certiorari, and in so reviewing and determining it.

2. If it had such jurisdiction, it erred in holding that the clerk's entries in the civil docket of November 3, 1950, quoted above, constituted the entry of a judgment under the law and the Rules of Civil Procedure.

3. The Court of Appeals had no jurisdiction either on certiorari or otherwise to review the assignments in petitioner's motion for a new trial which had never been ruled upon by the trial court, and to overrule the assignments which was in effect to overrule the motion, and then order final judgment entered for respondent; and it erred in doing so. At most its jurisdiction was limited to vacating the order granting the new trial upon the ground the trial court gave for it, and to remanding the case with directions that the trial court consider and act upon that motion and the assignments therein.

4. If it had such jurisdiction, it erred in holding that petitioner had a fair and impartial trial, and was not prejudiced by the statements and rulings of the trial court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, in holding that it had jurisdiction to review this cause by certiorari, decided an important question of federal law in a way in conflict with applicable decisions of this Court, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Also that holding was by a divided court, Judge Bratton dissenting.

2. The Court of Appeals' decision that the entries of November 3, 1950, in the civil docket, quoted above, constituted the entry of a judgment within the meaning of the law and the Rules of Civil Procedure, is in direct conflict with the decision upon the same matter of the Court of Appeals for the Eighth Circuit in *St. Louis Amusement Co.* v. *Paramount Film Distributing Corp.*, 158 F.2d 30; and with the decisions of the Court of Appeals for the Ninth Circuit in *Wright* v. *Gibson*, 128 F.2d 865; *Cashion et al.* v. *Bunn et al.*, 149 F.2d 965; and *Uhl* v. *Dalton*, 151 F.2d 502; and with the decisions of the Court of Appeals for the Fifth Circuit in *Re Hurley Mercantile Co.*, 56 F. 2d 1023, 1024-1025, and in *Scott et al.* v. *Gearner*, 197 F.2d 93; and said decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The action of the Court of Appeals in reviewing and overruling the assignments of error in petitioner's motion for new trial, which had never been ruled upon by the trial court, and ordering judgment entered for respondent, thus in effect overruling that motion, is violative of the statutes defining the jurisdiction of the Courts of Appeals and that of the District Courts, and giving to the former only appellate and not original jurisdiction; and is violative of Civil Procedure Rule 59, which clearly intends that motions for a new trial shall be determined by the District Court; and also is in conflict with the decision of this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, holding that a party filing a motion for a new trial "is entitled to the trial judge's decision" of it.

4. In holding that no prejudicial error was committed against defendant and that it had a fair and impartial trial, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

CONCLUSION

The questions involved are important and should be authoritatively determined by this Court. Many cases seeking a review of orders allegedly granting a new trial upon the Court's own initiative more than ten days after entry of judgment have gone and many more will go to the Court of Appeals. So far as we have been able to find, this is the first one that has been reviewed on certiorari. It is important that it be determined whether that use of the writ is authorized by Section 1651, Title. 28, USCA.

Not only should the conflict between the decision here and those of the Courts of Appeals for the Eighth, Ninth, and Fifth Circuits cited above be resolved by this Court, but it is important that the provisions of Rules 58 and 79(a), hereinbefore quoted, be construed by this Court, and that it be authoritatively determined whether they mean that the entry of a bare recital that judgment is entered as per a journal entry to be but never furnished, and without stating for whom, against whom or in what amount it is rendered, constitutes a judgment within the meaning of those rules—in short, whether it was the intent of the rules to abolish what has heretofore been deemed the minimum essentials of a judgment.

It is important that it be determined whether the Court of Appeals could lawfully order a final judgment entered against petitioner while the latter's motion for new trial, timely filed, was pending in the trial court and unacted upon there; and whether the Court of Appeals possessed the original jurisdiction to act upon that motion itself and overrule it.

Also, the case calls for an authoritative determination whether the startling statements and rulings of the court made in the jury's presence, commending respondent's witnesses, and tending to disparage petitioner's witnesses and to deprive such testimony as they were permitted to give of probative effect in the minds of the jury, its refusal to permit one of petitioner's witnesses to give testimony upon the crucial issue in the case, its statement in the jury's presence that Marcus and Hanson were not competent to do anything more than answer hypothetical questions and state what it would take to break the rod,

and that anything else from them was "improper and immaterial", and that evidence as to the inspections and tests the rod underwent "wouldn't enlighten the jury the least bit", and its open espousal of respondent's cause, were not only severally erroneous but operated in their cumulative effect to deny petitioner a fair and impartial trial.

Respectfully submitted,

DAVID A. RICHARDSON,
1133 First National Building,
Oklahoma City, Oklahoma,

Attorney for Petitioner.

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1952

THE CHRYSLER CORPORATION,
Petitioner,

VERSUS

RUTH KANATSER,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The record is in two parts: (1) the transcript in Cause No. 4360, filed in respondent's prior appeal, upon which the Court of Appeals heard and determined the instant Cause No. 4434 (RCA 19), and (2) the transcript of the proceedings in the Court of Appeals in the latter case. To distinguish between them, the page references herein preceded by the letter R. are to the transcript in No. 4360, and those preceded by the letters RCA are to the transcript of the proceedings in the Court of Appeals in this cause.

This brief is intended, not as petitioner's brief on the merits if the writ shall be granted, but to show that the questions presented are substantial and important, that their decisions below were probably erroneous, and that they call for authoritative determination by this Court.

The petition for the writ states the questions presented, contains a statement of the case, and specifies the errors intended to be urged. We shall present the latter in the order there stated.

I.

The Court of Appeals erred in holding that it had jurisdiction to review this cause on certiorari, and in so reviewing it.

That Court having dismissed respondent's appeal from the order granting a new trial (*Kanatser* v. *The Chrysler Corp.*, 195 F.2d 104), respondent filed a petition for a review of the cause by certiorari (RCA 15-18) which the court granted (RCA 65) over petitioner's objection that it was without jurisdiction so to review it (RCA 31-35). The writ having been granted, the cause was heard upon the transcript filed in the appeal.

As to judgments and orders of the District Courts, the jurisdiction of the Courts of Appeals is limited to "appeals" from "final decisions." Sec. 1291, Title 28, USCA, says:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *, except where a direct review may be had in the Supreme Court."

While Sec. 1651, Title 28, USCA, provides that "all courts established by Act of Congress may issue all writs necessary or proper in aid of their respective jurisdictions and agreeable to the usages and principles of law", that is not a separate and independent grant of jurisdiction, authorizing the review of a cause by certiorari instead of

appeal. It authorizes the Courts of Appeals to issue certiorari only *"in aid of their respective jurisdictions"*, and not otherwise. That was held in *Whitney* v. *Dick*, 202 U. S. 132, 137. See also *American Const. Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 380.

Also, petitioner having filed a timely motion for a new trial assigning errors which, if true, entitled it to a new trial (R. 268-273), which assignments have never been overruled or acted upon by the trial court, the Court of Appeals had no jurisdiction itself to overrule them on certiorari, or to order judgment entered while that motion was pending and undetermined. The cause therefore was not one of which the Court of Appeals could make a summary disposition by certiorari, and under the statute it could review the errors assigned in petitioner's motion only after final judgment and only on appeal.

If it had been the view of the bench and bar that the validity of an order granting a new trial, made in alleged violation of Rule 59(d), could be determined on certiorari, the writ would have been utilized for that purpose in the numerous cases involving that question that have gone to the Courts of Appeals since the adoption of the Rules of Civil Procedure; but, to the best of our information, this is the only case in which that remedy has been invoked or granted. In all the others the review has been on appeal or cross-appeal from a final judgment rendered in the second trial [*Pettingill* v. *Fuller* (7 CA), 107 F.2d 933, *cert.* den. 309 U. S. 669; *Marshall's U. S. Auto Supply* v. *Cashman*, (10 CA), 111 F.2d 140; *Freid* v. *McGrath* (App. DC), 133 F.2d 350; *Bailey* v. *Slentz*, (10 CA), 189 F.2d 406;

U. S. v. *Hayes*, (9 CA), 172 F.2d 677; *Buder* v. *Fiske*, (8 CA), 174 F.2d 260; *Ford Motor Co.* v. *Busam Motor Sales*, (6 CA), 185 F.2d 531].

In *Kanatser* v. *The Chrysler Corp.*, 195 F.2d 104, the Tenth Court of Appeals, in dismissing the appeal in this case, said:

> "While an order granting a new trial is not one from which an appeal will lie, it is reviewable. But it is open to review through regular channels only on appeal from a final judgment subsequently entered or on appeal from an appealable order."

Also, it is significant that, while the Rules of Civil Procedure deal comprehensively with the time and manner of appealing from the District Court to the Court of Appeals, they make no mention whatever of certiorari or the time or method of invoking that remedy.

The question, to say the least, is in doubt, as illustrated by the practice followed in the cases cited above; and it should be authoritatively determined by this Court.

II.

The Court of Appeals erred in holding that the clerk's entries in the civil docket constituted a judgment within the meaning of the law and Rules of Civil Procedue, and that therefore the District Court had no power after ten days from the date of the entries to grant a new trial upon its own initiative.

The entries were, "Judgment entered on verdict per J. E. (journal entry) to follow" (RCA 1-2), and "Judgment entered on verdict and counsel for plaintiff directed

to prepare J. E. accordingly" (RCA 8). In its briefs and argument petitioner urged that neither of them constituted a judgment within the meaning of Rules 58 and 79(a), and that no judgment as provided in those Rules has ever been entered. If that contention is correct, then under Rule 59(d) the trial court had jurisdiction to order a new trial at the time he did so for the reason he assigned.

No judgment exists for the purpose either of appeal or of execution until it is entered. Civil Procedure Rules 58, 73(a) and 62(a).

Rule 58 provides that "the notation of a judgment in the civil docket" must be "as provided by Rule 79(a)" in order that it "constitute the entry of the judgment"; and Rule 79(a) provides that the "notation shall be brief but shall show * * * the *substance* of each order or judgment of the court * * *."

Neither of the journal entries of July 16 (R. 282) and July 18, 1951 (R. 283-4)—the first granting petitioner a new trial, and the second overruling its motion for judgment n.o.v. and stating that its motion for a new trial had been disposed of as shown by the prior entry—constituted a judgment in respondent's favor. Therefore, if any judgment was entered more than 10 days before the new trial was granted, it consisted solely of the two entries quoted above.

Neither of them states that respondent shall recover of petitioner any sum whatever. They merely recite that judgment is entered, but do not state its "substance." The word "judgment" is only the name of an entry which awards or denies a recovery, and, in case of an award,

states in whose favor, against whom, and for what sum it is made; and a bare recital that judgment is entered without stating its "substance" is not a judgment. And certainly is that true where the very recital itself shows that the judgment is yet "to follow" and one of the parties is directed to prepare it.

The decision of the Court of Appeals that those entries constitute a final judgment (RCA 69) is in direct conflict with the decisions upon the same matter of the Court of Appeals for the Eighth Circuit in *St. Louis Amusement Co.* v. *Paramount Film Dist. Co.*, 158 F.2d 30; and of the Court of Appeals for the Ninth Circuit in *Wright* v. *Gibson*, 128 F.2d 865; *Cashion et al.* v. *Bunn et al.*, 149 F.2d 968; and *Uhl* v. *Dalton*, 151 F.2d 502; and of the Court of Appeals for the Fifth Circuit in *Re Hurley Merc. Co.*, 56 F.2d 1023, 1024-1025, and *Scott et al.* v. *Gearner et al.*, 197 F.2d 93, all of which petitioner cited in its briefs.

In *St. Louis Amusement Co.* v. *Paramount Distributing Co., supra*, the fourth syllabus is as follows:

> "Entries made in docket of clerk of the District Court that 'in accordance with the opinion of the court it is ordered that judgment be, and the same is hereby entered sustaining the motions of defendants to dismiss and for summary judgment', was not a recorded final judgment finally disposing of the case necessary to review of the merits, and, where the record failed to disclose that such final judgment had been rendered and entered, plaintiffs' appeal was dismissed as premature. Federal Rules of Civil Procedure, Rule 58, 28 U. S. C. A. following Section 723c."

In *Wright* v. *Gibson, supra,* the second syllabus is as follows:

> "The minute entry of the clerk of the District Court, stating that motions had been argued and submitted, that the court filed its opinion, and that 'said motions are granted', did not constitute entry of an 'order', 'judgment', or 'decree', from which an appeal could be taken. Jud. Code § 128(a), 28 U. S. C. A. § 225(a)."

In *Cashion et al.* v. *Bunn et al., supra,* the syllabus is as follows:

> "Where complaint contained two counts, an order which merely granted defendant's motion for summary judgment dismissing the first count, no judgment being entered, was not a 'final decision' and was not appealable. Jud. Code § 128(a), 28 U. S. C. A. § 225(a)."

In *Uhl* v. *Dalton, supra,* the second syllabus is as follows:

> "Clerk's notation in civil docket 'judgment denied as to both plaintiff and defendant' did not constitute the 'entry of a judgment.' Federal Rules of Civil Procedure rule 58, 28 U. S. C. A. following section 723c.'

See also in *Re Hurley Merc. Co.* (5 CCA), 56 F.2d 1023, 1024-5; *Scott et al.* v. *Gearner et al.* (5 CA), 197 F.2d 93.

In *G. Amsinck & Co.* v. *Springfield Grocery Co.*, (8 CCA), 7 F.2d 855, in which Judge Phillips, now Chief Judge of the Tenth Court of Appeals, sat and concurred, the Court said:

"The memorandum claimed to constitute a judgment does not purport to be the final judicial act. It does not adjudge or order that plaintiff shall recover any specified amount of money; it provides that there shall be a judgment according to the opinion of the court—not that there is a judgment by the instrument filed. No execution could have been issued thereon—no appeal taken therefrom. It was merely an order for a judgment."

Further on the Court said:

"A verdict of a jury has little efficacy unless carried out by a judgment. *Smith* v. *McCool*, 83 U. S. (16 Wall) 560, 21 L. Ed. 324. A verdict of a jury, without a judgment being entered would leave a case upon the docket for action at a subsequent term. That the court would have the power to set aside a verdict of the jury on the question of newly discovered evidence, of course, is elementary. It could certainly do as much with its own opinion. *Leary* v. *Leary and others*, 68 Wis. 662, 32 N. W. 623."

On December 29, 1949, the District Court adopted, entered of record, and caused to be printed and distributed its Revised Rules governing proceedings therein, effective on March 1, 1950, which rules were made a part of the record in this case (RCA 4-5). Rule 22 is as follows:

"A party obtaining an order or judgment shall within five (5) days, unless an extension of time is granted by the court, prepare a form of journal entry to be presented to the court for his signature, after the approval of opposing counsel has been noted thereon. If the parties are unable to agree upon the order or judgment, they shall immediately submit their differences to the court, who will then prescribe the form and contents thereof" (RCA 5).

That rule was authorized by Section 2071, Title 28, USCA, and by Civil Procedure Rule 83. Rules so adopted have the force and effect of law (*Rio Grande Irr. etc. Co.* v. *Gildersleeve*, 174 U. S. 603, 608-609). This Court recognized the right of the District Courts to make rules governing the entry of judgments in *United States* v. *Hark*, 320 U. S. 531, saying that it was "unaided by statute or *rule of court.*"

The entries in the civil docket, "Judgment entered on verdict per J. E. to follow" and, "Judgment entered on verdict, and counsel for pltff. directed to prepare J. E. accordingly", were made in conformity with Rule 22, and they show that they were not intended as the judgment, were mere minutes, and that the judgment was yet "to follow." In *Scott et al.* v. *Gearner et al.* (5 CA), 197 F.2d 93, it was contended that an entry stating, "Entering judgment for plaintiff, collector enjoined, foreclosure as to Marvin Lansford's interest granted", constituted the judgment. The Court of Appeals, after citing a prior decision that it did not, said:

> "But, this case aside, to hold that the decree to be appealed from was the docket entry rather than the formal decree is to go directly contrary to the judge's opinion quoted above, *in which he directed the counsel to prepare the decree and provide for exceptions.*"

Here the first entry showed that the judgment was to be as "per J. E. to follow", and the second expressly directed counsel for plaintiff "to prepare J. E. accordingly." They show that a judgment in accordance with Rule 22 was to be prepared, signed and entered; and the clerk has certified that none was ever furnished or entered.

Section 1963, Title 28, USCA, provides that a final judgment for the recovery of money "entered in any district court" may be registered in any other district by "filing a certified copy thereof", and shall then have the same effect as a judgment of the District Court where registered and may be enforced in like manner.

Imagine the clerk of the trial court making a certified copy of the judgment in this case for registration in another district. What would go into it? If the clerk of the court in the other district should undertake to issue execution on those entries, in whose favor, against whom, and for what amount would the execution run?

The clerk of the trial court, pursuant to Rule 44(b), has certified that no journal entry was ever furnished him and that no judgment in the case has ever been entered, and that certificate was made a part of the record in the Court of Appeals (RCA 3). See *United States* v. *Hark*, 320 U. S. 531, 535.

It is important to the bench and the bar that they know whether it was the purpose of Rules 58 and 79(a) to abolish what has heretofore been deemed the minimum essentials of a judgment, and to substitute therefor a bare recital that judgment is entered as per a journal entry to follow, without stating for whom, against whom, or for what amount the judgment is, and that the conflict between the decision here and those of the other Courts of Appeals be resolved.

III.

The District Court not having acted upon the assignments of error in petitioner's motion for a new trial, the Court of Appeals erred in assuming the original jurisdiction to consider and act upon those assignments and in effect to overrule the motion, and in ordering final judgment entered for respondent while that motion was pending and undisposed of in the trial court.

Petitioner filed a motion for judgment n.o.v. and, in the alternative, for a new trial, in which latter it assigned that the verdict was contrary to the evidence, that the court erred in admitting incompetent and excluding competent evidence, in commending respondent's witnesses and disparaging petitioner's witnesses in the jury's presence, in his instructions given, and in refusing instructions requested (R. 268-273, and RCA 9-13).

That motion has never been overruled by the trial court. That court's only order respecting it was that "defendant's motion for a new trial is granted on the ground that the verdict is excessive and because of the failure of plaintiff to file a remittitur as required by the court" (R. 282-283, and RCA 13-14). The assignments in the motion stand unacted upon by the trial court, but the Court of Appeals purported to review and overrule them.

The jurisdiction of the Court of Appeals is solely appellate (Section 1291, Title 28, USCA). It has no original jurisdiction (*Whitney* v. *Dick*, 202 U. S. 132, 137). Action upon a motion for a new trial, however, is the exercise of original jurisdiction, and belongs solely to the court that tried the cause and to which the motion is addressed.

In *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, the defendant, after an adverse verdict, moved for judgment n.o.v., and, in the alternative, for a new trial. The court sustained the motion for judgment n.o.v. and refused to pass on the motion for a new trial. On plaintiff's appeal the Court of Appeals reversed the judgment n.o.v. and ordered judgment entered on the verdict. This Court held the latter order erroneous, said that the defendant was "entitled to the trial judge's decision" on his motion for a new trial; that he was "entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge"; that the motion may invoke the discretion of the trial court if based on the claim, as was the motion here, that the verdict was against the weight of the evidence, that there was error in the admission or rejection of evidence or in the instructions to the jury, or that the trial was not fair to the moving party. And it held that the Court of Appeals erred in ordering final judgment, and directed that it remand the cause to the District Court to hear and rule upon the motion for a new trial. Here the Court of Appeals purported to pass upon the motion itself, in effect overruled it, and ordered the purported judgment reinstated.

And, of course, if the clerk's entries did not constitute a judgment under the law and the Rules, then, under Rule 59(d) the District Court had jurisdiction to make the order at the time he did so and upon the ground he assigned; and, since the order was not a "final decision", it was not reviewable either by appeal or by certiorari.

IV.

If the Court of Appeals had such jurisdiction, it erred in holding that petitioner had a fair and impartial trial and was not prejudiced by the statements and rulings of the trial court.

(1) After Feeney had testified and before either Marcus or Hanson had been called to the stand, respondent's counsel requested that Feeney be excused, to which the court replied in the jury's presence:

> "I would like to have him here *after these other experts take the stand* if it is possible. * * * This is a little technical and *I would like to find out about it from a practical man.* * * * I would like to have this man remain unless it is just going to be too much of an imposition on him" (R. 61-63).

That statement meant, and the jurors knew it meant, that the court approved of Feeney as competent, trustworthy and disinterested, and did and would rely on his testimony, and that he doubted whether Marcus and Hanson, "these other experts", would testify truthfully and correctly, and whether their testimony might not need rebuttal which the court desired it to have. The court's attitude toward Marcus and Hanson was distrustful if not hostile throughout.

Feeney possessed no qualifications superior to those of the ordinary automobile repairman (R. 35). And he was a partisan. He interested himself actively in undertaking to build up a case for respondent. He wrapped the longer piece of the rod in cloth and preserved it (R. 37). He showed it to Bellmore (R. 71) and Jones (R. 95) and

pointed out the discoloration to them. Although his deposition had been taken while he lived in Pontiac (R. 32, 54), nevertheless, after moving to Florida, he came all the way from that state to Oklahoma to testify orally. And while in Oklahoma City he busied himself in undertaking to build up the case. He testified that while there he went to three different wrecking yards in search of a broken tie-rod in preparation for testifying (R. 27).

And thereafter the court in his instructions said to the jury:

> "It seems to me that Mr. Feeney, a practical mechanic of many years' experience, would know whether or not there was a preexisting crack in that piece of metal, in that tube. I think he did know. I think he could determine that with reasonable certainty. I believe his testimony *that there was a preexisting crack in the piece of metal.* From that, I think under the other facts in this case, the only reasonable conclusion to draw is that it must have been broken" (R. 264).

Feeney never testified that there was a preexisting crack in the rod. He testified only that he believed there was, but that he based his belief solely upon the discoloration of a portion of the broken edge (R. 35).

(2) Mr. Hanson, petitioner's metallurgist, testified that when he first saw the two broken pieces of the rod, they showed the same bend that is now on them, and the seam in them was spread and opened as it is now, and that "it showed very sharp valleys and hills and over on this other section, we get the larger area again, and—." Before the

witness could go further, the court interrupted him, and said in the jury's presence:

> "Mr. Attorney, it seems to me as I understand the rule of law, when you have an expert witness, you just give him a hypothetical question and ask him what his opinion is, and then if the other side wants to cross-examine him they can. But it is not proper to have him *build up his testimony* by going into all the ramifications of his mind, which are likely not to be understood by the jury. Now this is an expert witness, and I am willing and it is proper for you to ask him what his opinion is, *but as to all this other, I think it is improper and immaterial* * * *" (R. 236).

That was to say that the fact that Hanson possessed the qualifications of an expert witness disqualified him from testifying to facts which he had personally seen and observed. Also the statement that he was attempting "to build up his testimony" was an unjustified disparagement of him.

(3) Marcus testified (R. 201-204) that he and Hanson took a Dodge car of the type involved, and against its frame broke with levers a number of tie-rods thereon at the same place on each at which the rod in question was broken, and that the pieces were bent and the seam in them spread and opened as was the case with the pieces of the rod in question, and that the oil in the rods seeped upon the broken edges of the pieces that hung down and discolored them as the broken edge of the rod in question was discolored.

Petitioner then sought to have Hanson give his testimony as to those experiments and their results, where-

upon respondent's counsel stated that he would agree that Hanson's testimony would be the same as that of Marcus and objected to his giving it, and the court sustained the objection and refused to permit Hanson to testify regarding the experiments and their results (R. 238).

A vital issue was whether the discoloration of the broken piece was due to age, indicating that the rod had been previously fractured, or was caused by the oil in it seeping upon the edge after it was broken in the collision. Upon that issue respondent had introduced the testimony of Feeney (R. 21), Brunton (R. 108), Jones (R. 93), and Bellmore (R. 63), but objected to petitioner's introducing two witnesses, and the court sustained the objection. That was erroneous and unfair. A party cannot be required to accept the admission even of a fact by his adversary and be prevented from putting on his testimony and proving the fact, thus robbing the testimony of much of its fair and legitimate weight (*Dunning* v. *Maine Cent. R. Co.*, 91 Me. 87; *Terre Haute Elec. Co.* v. *Kiely*, 35 Ind. App. 180; *Baumier* v. *Anteau*, 79 Mich. 509; *Clayton* v. *Brown*, 30 Ga. 490; *Stevens* v. *Citizens Gas & Elec. Co.*, 132 Iowa 597; *Henderson* v. *Ball*, 193 Iowa 812; *Hambleton* v. *U. Aja Granit Co.*, 102 Vt. 295; *Webster* v. *P. W. Moore & Sons*, 108 Md. 572; *Priest* v. *Groton*, 103 Mass. 530).

Much less can a party be denied the right to introduce competent and material evidence by an unsought admission that it will be the same as that of a prior witness. That renders the testimony impersonal and deprives it of the force and effect that the spoken words of a straightforward witness would have.

(4) Thereupon petitioner requested permission for Hanson to break upon a chassis then in court a tie-rod at the same point at which the rod in question was broken, in order that the jury might see the bend, the spreading of the seam, the travel of the oil across the broken edge and the discoloration it would cause. The court refused on the ground that Marcus had testified about it, and that it was clear what petitioner's theory was (R. 241-242). Later the court stated, out of the jury's presence, as an additional reason for that ruling, the following:

> "You can get an engineer or an expert who could come in here and he can fix a contraption right with that car that would break that thing any place he wants to. * * * I know that you can get an expert witness to testify to anything. You tell him what you want to prove and he will prove it. I have hired too many and I could hire the same one on one side of the case or on the other side of the case in my practice of law for 21 years. I know that to be a fact. * * * Now expert testimony is not satisfactory to me or as a rule to a jury. It is just as easy to fool a jury as can be" (R. 244).

(5) The court having refused to permit Hanson to break a rod in the jury's presence in order that they might observe the bend and break and the action of the oil or grease upon it, the following occurred:

> "Mr. Carse: In view of that ruling, Your Honor, will you permit us to return Mr. Hanson to the stand and let him describe what did happen? As it stands today we have only one witness—
>
> The Court (Interrupting): No, I won't. He has admitted he will testify to the same thing and that is the reason I won't do it.

Mr. Carse: It seems to me our defense has been limited to a very nominal amount of time.

The Court: Why, I will let you have all the time you want as long as you will offer any testimony that will be of any use to prove your case. This lawyer on the other side has admitted that this witness will testify to the same thing that the other one did.

Mr. Carse: Yes, I am sure he admits that, but I think it would be much more effective if he did so testify" (R. 245).

And again the court refused to permit the witness to give that testimony.

The Court of Appeals said that the trial court was justified in refusing to let Hanson testify to those experiments and their results because the court was "of the opinion that there was sufficient evidence before the jury for it to understand the theory of petitioner as to how the rod in the Kanatser automobile was broken" (RCA 61-62). But a theory is one thing and proof of it is another. The law did not restrict petitioner to having the jury understand its theory, but it was entitled to prove its correctness by showing that oil would and did seep upon the edges of the pieces that hung down and would and did discolor them just as the broken piece was discolored. Due process of law required that the witness be heard.

(6) When Mr. Marcus took the stand, petitioner's counsel asked him to describe the manner in which the rod was made and the inspections and tests it underwent, whereupon the following occurred in the jury's presence (R. 191-192):

"The Court: Objection sustained. It seems to me the question is, given this piece of tubing, was it or was it not partially broken at the time this car was sold? * * * And along this line of testimony that is the only question that remains, it seems to me.

Mr. Carse: But the method in which it was made and the strength of it will have a great bearing on that factor, and it received testing as it proceeded through the process of manufacture.

The Court: *The only thing you can do, as I understand the law, is to put an expert on and ask him what it would take to break it, and so forth.*

Mr. Carse: Well, I have always conceived that we had the opportunity of showing how it was made and the strength of it—of the parts.

The Court: Well, I disagree with you on what the law is and rule against you on that.

Mr. Carse: To show the tests that it received during its manufacture?

The Court: *That wouldn't enlighten the jury the least bit.* They are not metallurgists but this man is. Now he could testify as to what it would take to break this. Anything within reason to show whether or not it was broken or cracked partially through. That is the theory of the case. I will let you prove anything that will reasonably go to *disprove* that it was cracked at the time this woman bought the automobile. But the pieces he is feeling is not going to have anything to do with it. It wouldn't enlighten the jury; but I would like to hear what this man, an expert, says about what it would take to break it and what the possibilities are, within reason, that it would or would not be broken."

And such evidence as petitioner succeeded in getting in respecting the inspections and tests the rod underwent was deprived of probative effect in the jurors' minds by the court's statements in their presence that the witnesses, being experts, were not competent to give it, and, also that, although the action was for negligence, the evidence was not relevant or material.

(7) The court told the jury in his instructions that he believed that Feeney knew whether there was a pre-existing crack in the rod, and that he believed "his testimony that there was" (R. 264), which testimony Feeney never gave, but merely said that he believed there was, but that the discoloration was the sole basis of his belief.

Also, the court said to the jury, "I think it reasonable to think that this lady was not driving at a high rate of speed with a new automobile"; but he made no reference to the testimony of the three occupants of the other car or to the physical facts which demonstrated that the car was being driven at a high speed. He then said, "Her car went out of control" (R. 264), as though it were an admitted fact, and made no reference to the testimony of the three occupants of the other car to the contrary. That was equivalent to saying that the rod broke before the collision.

The foregoing violated the uniform holding that the trial court's comments must not be argumentative or amount to an unjustified espousal of the cause of one of the parties, but must be impartial, dispassionate, and judicial (*Quercia* v. *United States*, 289 U. S. 466; *Minner* v. *United States* (10 CCA), 57 F.2d 506); and that his statements, rulings, and comments must not be partial or one-sided. If he states the evidence at all, he must state that which

makes in favor of a party as well as that which makes against him. He must not submit the evidence or theory of one party prominently and fully without calling attention to the main points of the opponent's case. (*Starr* v. *United States*, 153 U. S. 614; *Sperber* v. *Conn. Life Ins. Co.*, (8 CCA), 140 F.2d 2; *Pullman Co.* v. *Hall*, (4 CCA), 46 F.2d 399; *Young* v. *Travelers Ins. Co.*, (10 CCA), 68 F.2d 83; *Sacramento Suburban Fruit Lands Co.* v. *Jensen*, (9 CCA), 36 F.2d 936.)

(8) Petitioner requested in writing the following instructions, which the court refused to give (R. 266-268):

> No. 1. "The jury are instructed that although defendant Chrysler Corporation manufactured the automobile in question, the law did not make it a guarantor that the tie-rod used in it was free from defects and that it would not break and cause injury. The law only required that it exercise reasonable care not to place in the automobile a tie-rod that was cracked or broken. Reasonable care is that degree of care which a reasonably prudent person would exercise in relation to the matter under the same circumstances."
>
> No. 2. "The undisputed evidence is that the defendant itself did not manufacture the tie-rod, but purchased it as an assembled unit from another company which was engaged in the manufacture of tie-rods. If the tie-rods manufactured by the company from which defendant purchased the rod in question were known and recognized in the automobile industry as being sound and safe, then the law only required of defendant that it make a reasonable inspection of those which it purchased for the purpose of discovering any defects apparent in them, and that it not place in any of its automobiles a tie-rod in which a defect was dis-

covered. And, if the defendant made a reasonable inspection of the rod before putting it in the car and putting the car on the market, and failed to discover any defect in it, then it was not guilty of negligence in using the rod and in putting out the car to which it was attached, and in such event, your verdict should be for the defendant, even though you may believe that the tie-rod broke before the automobile in question collided with the other car."

No. 5. "You are further instructed that if you find from a preponderance of the evidence that the accident and the plaintiff's injuries, if any, were due entirely to the negligence of the person driving the automobile in which she was riding, then in such event, your verdict should be for the defendant."

No. 7. "You are further instructed that the mere proof of an accident or injury carries with it no presumption of negligence, but the burden of proof rests upon the party alleging negligence to establish the same by a preponderance of the evidence, and likewise, it is incumbent upon such party to show that such negligence thus established was the proximate cause of the injury or damage, if any received, by the party alleging the same."

In no instruction given did the court so much as mention petitioner's contention that the discoloration was caused by oil seeping upon the break after the collision. He told the jury unqualifiedly that the Kanatser car went out of control. He stated that he did not believe it was being driven at a high rate of speed, without mentioning the testimony of the three occupants of the car with which it collided or referring to the physical facts that demonstrated that it was.

The statements, rulings, instructions, and refusal to instruct above set out were sanctioned by the Court of Appeals in its opinion. This Court has had nothing to say upon the subject since its decision in *Quercia* v. *United States*, 289 U. S. 466; and it is submitted that the case calls for the determination by this Court of the limits to which a trial court may go in his statements, comments and rulings without rendering the trial unfair.

Respectfully submitted,

DAVID A. RICHARDSON,
1133 First National Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

Of Counsel:
RICHARDSON, COCHRAN, DUDLEY, FOWLER & RUCKS.

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